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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO HERNANDEZ, Defendant and Appellant.	F077616 (Super. Ct. No. VCF322790) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian. (Retired Judge of the Tulare Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, and Louis M. Vasquez and Cavan M. Cox II, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Poochigian, J. and Franson, J.

INTRODUCTION

Appellant Francisco Hernandez was convicted by a jury of a misdemeanor charge of resisting arrest. After a mistrial was declared on a second count, he pled to a felony violation of Penal Code[1] section 69, pursuant to an agreement. Prior to trial, Hernandez filed a *Pitchess*[2] motion for disclosure of personnel records of the two deputies involved in the arrest. After an in camera review, the trial court ordered one document released.

In this appeal, Hernandez seeks independent review by this court of the *Pitchess* documents.

FACTUAL AND PROCEDURAL SUMMARY

On August 20, 2015, Tulare County Sheriff's Deputies Joel Puckett and Robert Garcia were working as bailiffs when a judge ordered that Hernandez be taken into custody. When Puckett began patting Hernandez's clothing as part of processing, Hernandez responded with " '[y]ou're not gonna f***ing touch me' " and began headbutting Puckett. Puckett repeatedly advised Hernandez to cease resisting.

Puckett radioed for assistance and Garcia responded. Garcia ordered Hernandez to cease resisting. Hernandez responded by flailing his legs in an attempt to kick Garcia. After warning Hernandez to stop, Garcia used a taser on him, after which Hernandez stopped resisting.

An information filed on December 29, 2015, charged Hernandez with two counts of violating section 69. On April 6, 2016, Hernandez filed a *Pitchess* motion seeking the personnel records of Puckett and Garcia. The motion was opposed by county counsel.

A hearing on the *Pitchess* motion was held on April 28, 2016. After an in camera review, the trial court ordered that one internal affairs complaint alleging assault by Garcia be disclosed.

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1 References to code sections are to the Penal Code.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

The jury trial finally began on January 3, 2018. On January 4, 2018, the jury found Hernandez guilty of a misdemeanor offense of resisting arrest on count 2, pertaining to the interaction with Garcia. On the count 1 offense pertaining to Puckett, the jury was unable to reach a verdict and a mistrial was declared.

On May 18, 2018, Hernandez was sentenced on the misdemeanor conviction to 24 months of probation, to include 180 days of custody. He was deemed to have served the 180 days. A plea agreement was reached on the count 1 offense involving Puckett, whereby Hernandez would plead to a felony violation of section 69 with the understanding that if he obeyed all laws for one year, the offense would be reduced to a misdemeanor with no additional time.

On July 17, 2018, Hernandez entered a no contest plea in count 1 on the terms agreed to in the plea agreement. The matter was put over to August 23, 2019, and if Hernandez had obeyed all laws in the interim, the offense would be a misdemeanor with no additional time imposed.

Hernandez filed a notice of appeal on May 29, 2018.

DISCUSSION

At trial, Hernandez maintained Puckett and Garcia falsely reported what occurred during his arrest; the deputies used excessive force; and he responded with force necessary to defend himself. His *Pitchess* motion sought documents pertaining to any complaints against either deputy alleging use of excessive force, including disciplinary actions, statements of witnesses, and opinions of supervisors.

In this appeal, Hernandez asks this court to independently review the *Pitchess* materials. The materials initially were not included with the record on appeal. Consequently, on August 6, 2019, this court directed the Tulare County Superior Court to transmit the *Pitchess* documents to this court, or produce a settled statement, along with a sealed transcript of the in camera *Pitchess* hearing.

On December 31, 2019, this court received the transcript of the April 28, 2016 in camera hearing and transcripts of the *Pitchess* proceedings held on August 23, 2019, and September 10, 2019. However, no settled statement, no *Pitchess* documents, and no declaration of unavailability of documents by the custodian of records was filed with this court.

As applied to the instant case, the record of the confidential in camera *Pitchess* hearing held on April 28, 2016, shows that the court placed very general identifying information on the record about the confidential files it had reviewed. Moreover, the court did not retain sealed copies of those confidential files.

Therefore, on January 27, 2020, this court issued another order for the Tulare County Superior Court to prepare a settled statement and/or produce the *Pitchess* documents. This order provided detailed instructions on the procedures to be followed by the superior court if it had failed to keep copies of the *Pitchess* documents reviewed on April 28, 2016, as required by *People v. Mooc* (2001) 26 Cal.4th 1216, 1229–1230 (*Mooc*).

In *Mooc*, the Supreme Court addressed record preservation when the custodian of records presents the superior court with confidential files to review under *Pitchess*:

> "The custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion. A court reporter should be present to document the custodian's statements, as well as any questions the trial court may wish to ask the custodian regarding the completeness of the record." (*Mooc, supra,* 26 Cal.4th at p. 1229.)

Mooc further explained the superior court's duties to preserve the record:

> "If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state

> for the record what documents it examined. *Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent*. Of course, to protect the officer's privacy, the examination of documents and questioning of the custodian should be done in camera in accordance with [statutory requirements], and the transcript of the in camera hearing and all copies of the documents should be sealed." (*Mooc, supra*, 26 Cal.4th at pp. 1229–1230, fn. omitted, italics added.)

The superior court complied with this court's January 27, 2020 order and held a hearing in June 2020. At the *Pitchess* proceeding conducted in response to this court's January 27, 2020 order, the custodian of records testified pursuant to departmental policy that all "IA files" prior to 2013 had been purged. All other personnel records were still in existence.

With respect to Puckett, the custodian brought everything existing through April 28, 2016. The superior court noted that after reviewing the transcript of the April 28, 2016 hearing, there had been no internal affairs files for Puckett produced at that time.

For Garcia, the custodian brought the personnel file in existence up to April 28, 2016. There had been one internal affairs complaint filed against Garcia for an alleged assault, deemed unfounded, which had been purged. This was the document that had been released to the defense in response to the *Pitchess* motion in 2016.

The personnel files of Puckett and Garcia were subsequently filed with this court. After an independent review of the personnel records, we conclude there are no documents contained in those records that are responsive to Hernandez's *Pitchess* motion and the trial court did not abuse its discretion when it denied the motion as to those records. (*Mooc, supra*, 26 Cal.4th at p. 1232; *People v. Prince* (2007) 40 Cal.4th 1179, 1286.) Although the IA report on Garcia had been purged after the April 2016 *Pitchess* hearing, that document had been given to the defense following the 2016 hearing, before it was purged.

We now turn to the issues raised by the custodian's routine destruction of the one internal affairs file, the superior court's failure initially to maintain copies of all *Pitchess* documents, and the generalized descriptions of the documents reviewed at the in camera hearing on April 28, 2016.

Once the superior court finds good cause to review confidential personnel records pursuant to *Pitchess*, it is required to make a record of the materials it reviewed for purposes of appellate review. (*Mooc*, *supra*, 26 Cal.4th at pp. 1229–1230.) On appeal, this court is required to review the "record of the documents examined by the trial court" and determine whether the trial court abused its discretion in refusing to disclose the contents of the officer's personnel records. (*Id*. at p. 1229.)

Mooc requires the superior court to preserve the record for "meaningful appellate review" by retaining "copies of the documents it examined before ruling on the *Pitchess* motion, [making] a log of the documents it reviewed in camera, or just [stating] for the record what documents it examined (such transcript, of course, to be sealed) …." (*Mooc*, *supra*, 26 Cal.4th at p. 1228.) In this case, however, the court recited very limited information about the confidential files without retaining copies of those files. There is nothing in the record of the in camera hearings to indicate that the confidential files were too voluminous for copying. The superior court should have ordered the custodian to prepare copies of the entirety of the confidential files it reviewed at the in camera hearings, mark them as exhibits, seal the exhibits, and file the sealed exhibits with the sealed transcripts to await appellate review. Alternatively, the superior court could have preserved the record for "meaningful appellate review" by giving a more specific description of the contents of the confidential files it reviewed during the in camera hearing and sealing the transcripts. (*Id*. at pp. 1228–1229.)

Mooc states that in order to preserve the record, "the court can prepare *a list* of the documents it considered, or simply state for the record what documents it examined."

(*Mooc, supra*, 26 Cal.4th at p. 1229, italics added.) The superior court essentially prepared such a list when it recited certain identifying information into the record of the confidential in camera hearings, but recitation of that "list" did not fully satisfy *Mooc*: "*Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent.*" (*Id*. at p. 1229, italics added.) This additional directive gives meaning to *Mooc*'s holding that an appellate court must review the "record of the documents examined by the trial court" to determine whether the trial court abused its discretion in refusing to disclose the contents of the officer's personnel records pursuant to *Pitchess.* (*Id*. at p. 1229.)[3] While *Mooc* stated the superior court could discharge its duties by reciting a list or log of the confidential documents it had reviewed, such a suggestion presupposes that the list or log would necessarily correspond to copies of the actual files, in order to permit "meaningful appellate review" of confidential files which were before the superior court when it ruled upon the *Pitchess* motion. (*Id*. at p. 1228.)

In situations where confidential personnel files reviewed by the superior court at a *Pitchess* hearing are subsequently destroyed, and there is no evidence of bad faith, the appellate court may instead consider secondary evidence, including the superior court's statements about the contents of the files, in order to determine whether the court abused its discretion when it denied a defendant's *Pitchess* motion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1221, fn. 10.)

DISPOSITION

The judgment is affirmed.

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[3] *Mooc* further provides that when there is an insufficient record or any uncertainty as to which documents were reviewed by the trial court before it ruled on a *Pitchess* motion, the reviewing court may order a limited remand with directions for the trial court to conduct a hearing and clarify the confidential materials it reviewed in camera. (*Mooc, supra*, 26 Cal.4th at p. 1231.) We already took that step.